PP

v.

MOHAMMAD ARFAH JASMI

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 42-17-2006-II]
17 AUGUST 2007

CRIMINAL PROCEDURE: *Sentence - Appeal, against - Appeal by prosecution - Appeal by prosecution purely on grounds of inadequacy of sentence when there is no demonstrable error in law by trial judge - Whether wrong in principle for prosecution to appeal*

CRIMINAL PROCEDURE: *Sentence - Statutory rape - Exercise of discretion for sentence for statutory rape cannot be same as that for rape - Complainant and accused were lovers and complainant agreed to have sex with accused - Statutory rape an offence of passion committed with consent of parties - Discretion entirely with court what sentence to be imposed - Whether minimum sentence of five years imprisonment without whipping is correct*

The accused was charged with statutory rape of a 13 year old girl. The accused was a first offender and pleaded guilty to the charge. Both complainant and the accused were lovers and she had agreed to have sex with him. The act was not premeditated and there was no force used. The accused took full responsibility for what he had done and wanted to marry her but her parents refused because she was still schooling. The learned sessions judge sentenced the accused to five years imprisonment. Since no violence was used in the commission of the offence, whipping was not imposed. The prosecution appealed against inadequacy of sentence.

Held (dismissing the appeal):

(1) It is wrong in principle for the prosecution to file appeals and clog the criminal administration of justice purely on the grounds of inadequacy of sentence; that too in cases of first offenders when the prosecution cannot demonstrate that the trial court has erred in law in failing to take into considerations the guiding principles for sentencing. The learned sessions judge had given her grounds for judgment and it was difficult to disturb the same. (para 9)

A **(2)** Unlike rape, the exercise of discretion for the sentence for statutory rape cannot be the same; for rape is a violent offence and statutory rape is an offence of passion and that too by consent of parties. Parliament has left the discretion entirely to the court what sentence to be imposed save that
B there must be a minimum sentence of five years which must be imposed and whipping is only optional. (para 9)

Case(s) referred to:
Attorney Generals' References (Nos 120, 91 and 119 of 2002) [2003] 2 All ER 955 ***(refd)***
C *Jumari Mohamed v. PP [1982] 1 MLJ 282* ***(refd)***
Leken Gerik v. PP [2007] 8 CLJ 158 HC ***(refd)***
PP v. Hisla Sulai (m) (CRA-41-14-2007-II) (Unreported) ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Muhari Mohd Jani & Anor [1999] 8 CLJ 430 HC ***(refd)***
D *PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC* ***(refd)***
Rex v. Kenneth John Ball 35 Cr App R 164 ***(refd)***
Taib Gemok v. PP [1984] 1 MLJ 313 ***(refd)***

Legislation referred to:
Penal Code, ss. 375(d), (e), 376

E
For the appellant - Fazillah Begum Abdul Ghani SFC
For the respondent - In person

Reported by Amutha Suppayah

F

JUDGMENT

Hamid Sultan Abu Backer JC:

G **[1]** This is my judgment in respect of the prosecution's appeal against inadequacy of sentence passed by learned sessions judge. The accused was not represented here and the court below.

[2] The accused was charged as follows:

H 1. That you, on the 13th October, 2003, at about 3.00 a.m. at house No.196A, Kampung Tabuan Hilir, Kuching in the State of Sarawak, committed rape on one Nor Izza Shakirah Bte Jaraini (F), 13 years old and you thereby committed statutory rape which is an offence punishable under Section 376 of the Penal Code.

I 2. That you, on the 13th October, 2003, between 5.00 p.m. and 6.00 p.m., at house Lot No.1608, Lorong Juara 1C, Taman Sukma, Petrajaya, Kuching, in the State of Sarawak, committed rape on one Nor Izza Shakirah bte Jaraini (F),

13 years old and you thereby committed statutory rape which is an offence punishable under Section 376 of the Penal Code.

[3] Section 376 of the Penal Code reads as follows:

Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

[4] The facts of the case disclosed that while the victim was playing at her neighbour's house, the accused came and took the victim out to Petrajaya Complex. Later at about 11.30pm, the victim was afraid to go home for fear of being scolded by her father. At about 12.30am the next morning, the respondent brought the victim to the house of one Raduan bin Mos where they were allowed to sleep in the sitting room. At about 3am in the morning the offence was alleged to have been committed. The respondent was then 20 years old. The respondent pleaded guilty and his mitigation in the notes of proceedings reads as follows:

The accused is a first offender. He has a good sense to plead guilty to the charge. Thus saving court's time and expenses. The accused is divorced with a child looked after by his mother. He is working to support his aged mother and his child. By pleading guilty the family will lose their sole breadwinner. Both complainant and the accused were lovers. That's why she agreed to have sex with him. The act was not premeditated. There was no force used. In fact the accused wanted to take full responsibility for what he has done. He wanted to marry her but her parents refused because she was still schooling. Public interest is served by the accused's plea of guilty. The accused did not commit any offence from then until now. He is sincere to turn over a new leaf and become a law abiding citizen. I urge court to impose a minimum sentence of the law.

There was a similar case where the accused was sentenced to 5 years imprisonment and the appeal was dismissed. The accused request for cash bail to be returned.

[5] The learned sessions judge's grounds in relation to sentencing reads as follows:

The accused has the good sense to plead guilty to a charge of rape. The offence was committed on the 13th October, 2003 at about 3:00 a.m. in house no. 196A, Kpg. Tabuan Hilir, Kuching. It is not disputed that the accused and the victim were in a relationship. They had gone dating until 7:30 p.m. that night. The

victim was afraid to go home for fear of being scolded by her father and they finally ended up in a friend's house at midnight where they were allowed to sleep in the sitting room. Then at 3 a.m. in the morning, the offence was committed.

The Deputy Public Prosecutor has submitted a list of cases to influence me into meting out a heavy sentence against the accused. Public interest must be my prime consideration he said. Rampancy of the offence is another reason why I should also be harsh.

However, I begged to differ. I see before me a very young man who cowered with remorse. He knew he had done wrong and was willing to pay for his mistake. At the other end is his young girlfriend, the victim. She too has made a mistake and undeniably both will pay a high price for that mistake.

I do not think the harshness of my sentence will deter other young lovers from making the same mistake. The safeguard into ensuring that similar offences will not happen again starts at home and in school. At home where parents should impose discipline and religious knowledge to ensure that their daughters would not put themselves in situation which will bring about this kind of offence and in school where sex education can be taught so that both girls and boys are aware of the dire consequences of engaging in premarital sex.

I see absolutely no good coming out of sending a young man such as the accused to a long period of incarceration for a mistake that both he and the victim have mutually committed. I still think that the avowed aims of sentencing such rehabilitation of the offender must also be weighed against the gravity of the offence. If by sentencing the accused is further dissuaded from committing a criminal wrong in future, then I should consider that public interest has also been served in this case.

Our law does not fix a sentence for a particular crime but fixes a maximum sentence and leaving it to the court's discretion to decide what is appropriate for each given case. In the facts of this case, of particular relevance is the Court of Appeal case of *Mohd. Salleh bin MK Mohd Yusof v. Pendakwa Raya* [2005] 3 AMR 107 where the victims were 15 years and 14 years respectively. There was consent to the sexual intercourse committed by a man who deceived the girls into believing that he was a movie producer and a bomoh. He managed to get them to agree to have sex with him. The Sessions Court sentenced him to 5 ½ years imprisonment for each offence. The High Court enhanced the sentence to 10 years and 3 strokes of the rotan. The Court of Appeal however took into consideration the consent and restored the sentence of the Sessions Court.

I am of the view that there is all the more reason to adopt the approach of the Court of Appeal in this case because the accused and the victim were lovers and not only the victim but the accused was also young (20 years) at the time of the commission of the offence.

Thus for all the forgoing considerations, I sentenced the accused to 5 years imprisonment. Since no violence was used in the commission of the offence whipping is not imposed. Case bail is refunded. Accused discharge not amounting to acquittal in respect of the 2nd Charge.

[6] The appellant, in this appeal to increase sentence, heavily relies on my judgment in *Leken @ Delem Ak Gerik (m) v. Public Prosecutor* [2007] 3 AMR 230; [2007] 8 CLJ 158 and [2007] 3 MLJ 730 where it was stated:

Whipping has a practical and tactical significance in that even ferocious mammals have been trained by a cane, notwithstanding the fact that it can also be achieved by love and affection. By analogy, in my view unacceptable human conduct in criminal offenders in case of moral offences can sufficiently be arrested by the sentence of whipping. And that appears to be the intention of parliament for rampantly introducing whipping for serious offences. In case of violent offenders, it is necessary to provide in addition to whipping, long term imprisonment to reflect the gravity and seriousness of the offence and to keep the offenders out of criminal mischief. They must not be released early as they may be an immediate threat to the society. However, in the case of unchaste act between consenting parties, and for the first time offenders, the punishment of whipping without the need for long term imprisonment will be a sufficient deterrent and effective form of rehabilitation and to some extent will be seen as retributory punishment to heal the unseen wounds of the victim, their family, as well as the public sentiments for harsh punishment for perpetrators of the sin.

AND says that although the above case involves incest with a step-daughter where whipping was increased on appeal, in this case the learned sessions judge had only imposed the minimum sentence of five years which in any event is mandatory and has not in addition ordered whipping. On this issue, the appellant says that the decision of the learned sessions judge is not in line with the sentencing trend for the offence of statutory rape in Kuching Court and relies on 2 cases as precedents which was set out by the prosecution and is reproduced:

(a) In *Hishamuddin bin Piee* (SC-62-404-04-II) (CR Appeal 42-6-06-III) the accused was 42 years old whilst the victim, Stephanie Lydia ak Kusi was 15 years 10 months at the material time. (i) The facts of the case is as follows: On 8 December 2004 at about 10am, Kusi Sim ak Abi, the victim's father lodged a report at Balai Gita Kuching that on 4 December 2004 at about 5pm, that his daughter by the name of Stephanie Lydia ak Kusi, 15 years old had gone to look for her boyfriend. Later, on 7 December 2004 at about 8pm he brought her back from her boyfriend's house and suspected that she had sexual intercourse with her boyfriend. As a result of the report lodged, an investigation was carried out and revealed that on 4 December 2004 at about 5pm, the parents of the victim prevented her from going out from the house and locked her in her bedroom. However at about 7pm on the same day she was found missing from her bedroom. The parents went out to look for her but could not find her. However on 7 December 2004 at about 7pm the complainant was informed that her daughter was staying in the house of the accused at 11D Taman Malihah Matang, Kuching. The parents immediately proceeded there and brought their daughter home. The victim revealed that she went to stay with her boyfriend, the accused and that she had sexual intercourse with her boyfriend a few times with her own free will, no force or any threat by her boyfriend ie, on 4 December 2004 night time and October 2004 at the accused's house whilst on 4 December at about 8.30pm in Hotel Arif, Jalan Haji Taha, Kuching. The victim was brought for medical examination at the Sarawak General Hospital Kuching on 8 December 2004. The medical doctor, Dr. Rafae bin Amin who examined the victim confirmed the following: "The hymen tear at 5 o'clock position which is consistent with her history of blunt penetration". Police investigation led to the arrest of the accused at his house. The accused admitted that the victim was his girl friend and he loved her and had sexual intercourse with her a few times without force, in his house and in the hotel. (ii) The accused was charged with 3 charges under s. 376 of the Penal Code. (iii) In mitigation, the accused stated: first offender; plea leniency; deeply in love with the victim but family disapproved and planned to get married with the victim in future. (iv) The learned sessions judge sentenced the accused to five years imprisonment and one stroke of rotan for the 1st charge, 2nd charge and 3rd charge

respectively. The reasons given are: lovers; complainant shy; 2-4 months of consent age; first offender; save court's time and nuisance of a public trial. (v) The appeal in High Court is dismissed for reasons that the victim and respondent still care for each other; respondent did not take advantage of the victim and prosecution should submit cited cases for deterrent sentence in the lower court.

(b) In Ismail bin Majid (SC-62-31-05-1/11)(CR Appeal 42-1-06-I), the accused was 25 years of age whilst the victim, Aida Khizamah bte Hassan was 14 years shy of 9 days to 15th birthday. (i) The facts of the case is as follows. On 7 April 2004 at 2015 hours a police report was lodged by Aida Khuziamah binti Hassan, 14 years old, No. 6 Taman Gita Siol Kandis Kuching, that on 4 April 2004 at about 1330 hours she met the accused at Central Padang, Kuching who introduced himself to her as Mail. The accused later brought her to his house at No. 200, Lorong 2 Semariang Lot Petra Jaya, Kuching. In the accused's room upstairs at the accused's house, she was raped by the accused. The accused forced her to have sexual intercourse. Complainant could not dare to resist or fight back against the accused's approach as there was nobody else at home except both of them. The accused continued to rape her, all in all about 5 times, from the time she was brought to the accused's house at about 1330 hours until around midnight when the mother of the accused came home. The complainant was afraid to go home to her parents, as she was scared to be scolded by her father. The complainant stayed with the accused until 7 April 2004 when the father of the complainant came to fetch her home at about 2040 hours. The last time the accused had sex with her was on 7 April 2004 at about 5.30pm at the accused's house. As a result of the report lodged, the complainant was sent for medical check up at the General Hospital Kuching on 7 April 2004 and was examined by Dr. Ganendra Raj. The medical report confirmed that the complainant to be suffering from the following: "She has been sexually abused without her consent. There is evidence of vaginal penetration by blunt object as there are fresh tears of hymen at 5 o'clock and 9 o'clock and posteria fourchettte. Her injuries were caused by injury, penetration by blunt object. Police investigation led to the arrest of the accused on 7 April 2004 who admitted in his cautioned statement having sexual intercourse with the complainant at his house at No. 200, Lorong 2A, Kampung

Semariang Lot Petra Jaya, Kuching with her consent. The DNA test conducted on the seminal stains found on a pair of jeans and underwear of the complainant confirmed as belonging to the accused. The complainant was born on 13 May 1989 and at the time of rape she was over 14 years old. (ii) The accused was charged with 2 charges under s. 376 of the Penal Code. (iii) In mitigation, the accused stated: first offender; admit offence; will not commit offence in future; old parents need care and attention and both are lovers. (iv) The learned sessions judge sentenced the accused to 12 years imprisonment and 3 strokes of whipping for the 1st charge whilst 7 years and 2 strokes of whipping for the 2nd charge. The sentence to run consecutively. The reasons given are: not denied rampant offence and give sentence to deter like minded offender; lovers but accused took advantage and weight public verses accused interest. (v) On appeal to the High Court, the learned sessions judge's sentence was affirmed but strokes of whipping to 1 offence each for the reasons that no reason to disturb and the girl went willingly therefore whipping is excessive.

[7] Further, the learned Senior Federal Counsel complains in a vociferous manner that courts should not be over sympathetic to the accused and asserts in an unusual tone as follows:

> I am fully aware of the prosecution role in administering justice and to strike balance between the interest of the perpetrator and victim. However I would also humbly like to seek solace to this Honourable court in balancing the interest of both parties.

And relies on the following cases, where the courts on its own facts echoed various guidelines and principles in relation to sentencing principles. The authorities and statements the learned Senior Federal Counsel relies are set out as follows:

(a) In *Attorney Generals' References (Nos 120, 91 and 119 of 2002)* [2003] 2 All ER 955, it was stated:

> In all cases of sexual interference, whether amounting to rape or not, it was necessary to take into account all the degree of harm to the victim; the level of the offenders culpability; and the level of risk to society posed by the offenders. In all classes of sexual offences, it was also necessary to deter others from acting in a similar fashion. Moreover, before passing a lighter sentence because the offences were state, the court should weigh the impact on the victim.

(b) In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256, Justice Hashim Yeop A Sani opined: A

> President and Magistrate are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is facing an array of witnesses with authority. The mitigation submitted by the convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike balance, as far as possible, between the interests of the public and interests of the accused". Lord Goddard LCJ in *Rex v. Grondkowski* [1946] 1 All ER 560 at 561 offered some good advice when he said: B C D
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> > The judge must consider interest of justice as well as the interest of the prisoners. It is too often nowadays, thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. E

(c) In Hilbery J in *Rex v. Kenneth John Ball* 35 Cr. App. R 164 the court opined as follows:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe. F G H I

(d) In *PP v. Muhari bin Mohd Jani & Anor* [1999] 8 CLJ 430, the court opined:

> Lord Lawton in the Court of Appeal case of *R v. Sarjeant* [1974] 60 Cr App R 74, in giving the judgment of the court, referred to the classical principle of retribution in sentencing (he did also refer to the other principles of deterrence, prevention and rehabilitation). His Lordship said that the Old Testament concept of an eye for an eye and a tooth for a tooth no longer plays any part in criminal law and continued:
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> > There is, however, another aspect of retribution which is overlooked: *it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which they, the courts, can do this is by the sentence they pass.* The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is lead public opinion. (emphasis added.)

(e) In *Rex v. Grondkowski (supra)*, Lord Goddard LCJ observed:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

(f) In *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645, the court opined:

> Justice Shaik Daud expressed that in specific offences the court should not place too much emphasis on the fact that the offender is young and a first timer. Public interest demands that in such cases a deterrent sentence ought to be given.

(g) In *Jumari bin Mohamed v. PP* [1982] 1 MLJ 282, the court stated:

> For the purpose of doing substantial justice, the court must bear in mind that justice must be done not only to the convicted person but also to society at large on whose behalf the Public Prosecutor acts. As stated by Thomson CJ in *Veerasingam* case at page 78: "It is just as imperative that a rightful conviction should be successfully defended as it is that a wrongful one should be successfully attacked".

[8] In reliance of the above, the learned Senior Federal Counsel asserts that the sentence passed by the learned sessions judge is clearly inadequate and seeks to move this appellate court to seek a more considerable sentence to be passed without submitting why the discretion exercised by the learned sessions judge in law must be impeached by a court exercising its appellate powers.

[9] I have relentlessly repeated in my judgments that it is wrong in principle for the prosecution to file appeals and clog the criminal administration of justice purely on the grounds of inadequacy of sentence; that too in cases of 1st offenders when the prosecution cannot demonstrate that the trial court has erred in law in failing to take into considerations the guiding principles for sentencing. (See CRA-41-14-2007-II *Public Prosecutor v. Hisla bin Sulai (m)*, my judgment delivered on 28 May 2007). In this case the learned sessions judge has in crux and in a very articulate manner given her grounds for judgment and I find it difficult to disturb the same in reliance of the hollow submission of the prosecution who attempts to cite cases, the facts and circumstances of which are different from the facts of this case. Further, I take the view that the learned sessions judge will have considered various other factors though not mentioned in the grounds of judgment. My reasons are as follows:

(1) The offence charged though "rape" is not in the strictest term. in the ordinary language, one that can be attributed to the terminology of rape. Oxford dictionary defines rape as follows:

> The act of taking anything by force; violent seizure (of goods), robbery. The act of carrying away a person (esp. woman) by force.

Thus, rape ordinarily means a violent offence and is not between consenting parties. However, "statutory rape" is in essence a misnomer. It does not carry any characteristic of rape. It refers to an offence of having sex outside marriage with a female person below the age. The so called statutory rape finds a place in the Penal Code under s. 375(d) and (e) which reads as follows:

> 375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

A (a) against her will;

(b) without her consent;

(c) with her consent, when her consent has been obtained by putting, her in fear of death or hurt to herself or any
B other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception:

(d) with her consent, when the man knows that he is not her husband, and her consent is given because she
C believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;

(e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and
D consequences of that to which she gives consent;

(f) with or without her consent, when she is under sixteen years of age.

E Unlike rape, the exercise of discretion for the sentence for statutory rape cannot be the same; for rape is a violent offence and statutory rape is an offence of passion and that too by consent of parties. This act of statutory rape is one which not only the law condemns but is one that is also
F unacceptable practice among major religions, race and culture where the common trend has been that sex cannot be outside marriage whether or not the person is underage. The punishment in such cases where sex has taken outside marriage may attract death penalties under their respective
G customary law. However, Parliament has balanced this by imposing strict penalties only for sex outside marriage with a female below the age of 16 years. For this purpose, it has left the discretion entirely to the court what sentence to be imposed save that there must be a minimum sentence of 5
H years which must be imposed and whipping is only optional. I would have thought that whipping should be the mandatory sentence for case of statutory rape and term of imprisonment must be at the option of the court. The reasons for my view have been reflected in *Leken (supra)* which the prosecution had
I relied on in this case. However, the law does not permit this approach for statutory rape as it stands unless it is amended. Statutory rape must be seen to be more of a social problem and must be addressed through religious and/or moral

education by parents and authorities and imprisonment of offenders will only add to further social problems. A proper deterrent sentence *in lieu* of imprisonment in such cases will be whipping to instigate discipline. In the Brunei case of *Taib bin Gemok v. Public Prosecutor* [1984] 1 MLJ 313, Justice Rhind adequately explains why imprisonment alone should not be considered in certain cases; he opined in that case as follows:

> (i) in terms of penalties for criminal offences, a maximum sentence of 6 months' imprisonment and a fine of $1,000/- is indicative that the legislature does not regard an offence as being one of high order of gravity, and for such an offence it would normally only be in a situation where there were aggravating circumstances that a court would take the step of sending an offender, particularly a first offender, to prison. For offences under this section, a prison sentence should be the exception, at least for first offenders;
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> (ii) in the present case, a sentence of imprisonment was wholly in principle. A fine of $250/- should be substituted for the term of imprisonment and the appellant should be disqualified from applying for licences to drive any class of vehicle for a period of 12 months.

For the purpose of our case, the proposition of Justice Rhind is eye catching when His Lordship says:

> The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison where this is essential in the interest of society. I certainly do not regard it as in the interest of society to send people previously of good character, particularly young people, to prison when there are other adequate means of dealing with them.

The above quote is one which the prosecution must be in a position to comprehend with, at all material times, when it approaches the appellate bench. Besides, I take the view that the sub court must subscribe to the *dicta* of Justice Rhind according to the facts and justice of the case, unless the law prohibits the court from doing so.

[10] For reasons stated above, I dismiss the appeal. I hereby order so.